

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1075

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM G. WRIGHT,
Defendant-Appellant.

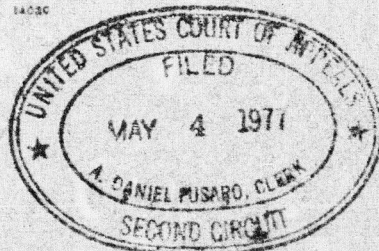
BRIEF FOR APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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STATUTE.

Title 18, United States Code:

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UNITED STATES OF AMERICA,
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v.

WILLIAM G. WRIGHT,
Defendant-Appellant.

On Appeal From the United States District Court
For the Western District of New York

BRIEF FOR APPELLEE

Preliminary Statement

William Wright was tried on a two count indictment charging him with making false declarations before a grand jury (Count I) and obstruction of justice (Count II). The Honorable Charles L. Brieant, Jr.,* acquitted the defendant of the obstruction of justice charge at the close of the Government's case. The jury found Wright guilty of making false declarations to the grand jury. Judge Brieant sentenced the defendant to six months imprisonment.

The defendant now appeals, alleging that some of the declarations made by him before the grand jury were not

* Of the Southern District of New York, sitting by designation.

material and, further, that the evidence was legally insufficient to sustain his conviction.

Statute Involved

Count I charged the defendant with violating Title 18, United States Code, Section 1623 which provides in pertinent part as follows:

- (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any books, paper, document, record, recording or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Statement of the Case

In April 1974, Federal investigators began looking into allegations that Kevin Brinkworth, a Buffalo attorney, had submitted fraudulent medical bills and lost wage statements to various insurance companies in connection with automobile accident claims he was prosecuting on behalf of his clients (Appendix 40). In due course, the matter was presented to a federal grand jury sitting in Buffalo, New York which subpoenaed many records relating to these claims including over two hundred insurance files (App. 55-56). One such file involved an automobile accident claim filed by Brinkworth on behalf of William Wright, a Buffalo police officer, for injuries he allegedly suffered in an accident which took place on January 24, 1972 (App. 42).

On May 20, 1975, the defendant appeared before the grand jury pursuant to a subpoena and testified about this

automobile accident claim and other matters. In seeking Wright's testimony, the grand jury was primarily concerned with determining the accuracy of Brinkworth's claims that Wright lost time from work as a result of the accident and saw Dr. John P. Mernan for treatment of his injuries on twenty separate dates during the two months immediately after the accident * During the fifty minutes he was in front of the grand jury, he answered, "I don't remember", "I don't recall", "I don't know", or words to that effect, in response to questions about the accident, his injuries, medical treatment he received and time lost from his job as a result of the accident (Gov't. Ex. 4). He was subsequently indicted for making false declarations and obstructing justice by giving false and evasive answers to the grand jury.

The Government and defendant stipulated at trial that on the date the defendant testified the Grand Jury was conducting an investigation into alleged mail fraud and conspiracy offenses relating to the negotiation and settlement of automobile accident claims submitted to insurance companies by Mr. Brinkworth on behalf of his clients (App. 57-58).

Walter Lohr, the insurance adjustor who handled Wright's claim, testified that he received several medical bills from Brinkworth, indicating that Wright had seen Dr. Mernan on twenty occasions for treatment of injuries which Dr. Mernan described in his bills as follows:

- (1) Sprain and strain of the cervical spine; (2) Sprain and strain of the lumbar spine; (3) Contusion of the upper left chest cage. Mr. Wright complained of headaches, pain, spasm and tenderness of the neck and upper left

* In July 1976 Brinkworth was indicted, along with Mernan and others, and is presently awaiting trial on three multi-count indictments, CR 76-107, 108 and 109, charging conspiracy and use of the mails in a scheme to defraud.

chest cage and low back. He received physical therapy in the form of cervical traction, infrared radiation, short-wave diathermy, message (sic) and progressive therapeutic exercises (App. 70-71).

The doctor's bill was \$225.00 (App. 68; Gov't. Ex. 6). Mr. Lohr also testified that he had received conflicting statements from Mr. Brinkworth regarding wages lost by Wright due to the injuries. At first, Brinkworth sent Lohr a letter on stationery of the City of Buffalo, stating that Wright lost eight days from work, or \$218.52 (App. 73). Later, another letter from the City of Buffalo indicated that Wright lost no time from work and that "previous letters stating 'lost time' were in error" (App. 80-81).

Two other individuals involved in the accident, Police Officer Richard Marvin and Victoria Carey, testified about details of the accident (App. 105-127, 128-136). Captain Floyd Edwards and Lieutenant Thomas Higgins of the Buffalo Police Department testified that Wright had been a Buffalo police officer since 1970 and that his police training included testifying in court (App. 138, 171-173).

The defendant testified in his own behalf and said that he had answered all the questions put to him before the grand jury "to the best of my recollection" (App. 206). However, he also said that police training instructors told officers that "we should never render a speculation, guess or personal opinion, and if there was something that we weren't quite sure of, that we should so testify that we weren't sure of it" (App. 199). He said he was unable to answer many of the questions since the events took place over three years earlier and he had not reviewed any reports or notes to refresh his memory prior to testifying in the grand jury (App. 206). Furthermore, he believed the Assistant U. S. Attorney was intimidating, harassing and badgering him in the grand jury.

On cross-examination, however, he conceded that before he testified he knew the subject would be his automobile accidents, but he did not make any effort to review any reports regarding the accidents, either on his own or with the Assistant U. S. Attorney (App. 220-222). Instead, he contacted Brinkworth, the subject of the grand jury's investigation, for advice. He again claimed no recollection of what his injuries were, if any, and could not estimate the number of visits he made to his doctor (App. 236-241). Five character witnesses testified that the defendant had a good reputation for truthfulness.

ARGUMENT

POINT I

The defendant's failure to ask the trial court to withdraw the specific assignments of perjury precludes review of this point on appeal.

Where a defendant has been found guilty of a count in an indictment which has more than one specification and it later appears that the verdict may be sustained on some but not all of the specifications, it has been held that the verdict must be set aside since it is impossible to tell which ground the jury selected. *Yates v. United States*, 354 U.S. 298, 312 (1957). However, to preserve the issue for review on appeal, the defendant must make a timely objection and ask the trial court to withdraw the specification from the jury. *United States v. Mascuch*, 111 F.2d 602, 603 (2nd Cir. 1940). In the absence of a specific request for a restricted submission, the point has not been preserved for appeal and the verdict may stand if the other specifications are sufficiently proved. *United States v. Goldstein*, 168 F.2d 666, 671 (2nd Cir. 1948).

The record in this case shows that the defendant failed to make a sufficient request to withdraw any of the specifications which he now asks this Court to review. The question regarding the materiality of the specifications first arose after the jury was selected but prior to proof when Mr. Sargent made the following request:

Mr. Sargent: Your Honor, what I would like to have on the record is some indication from you that at what point in this trial we will be able to move that *certain questions and answers* of this Indictment are immaterial and under the legal requirements of the Sections that it is maintained the defendant has violated would not have legal sufficiency to go to a jury.

The Court: You can move at any time, but I doubt that I could make a definitive ruling as to any of these questions in the absence of a full evidentiary trial record. Before the defendant's case goes forward, I am prepared to redact and physically strike out on your motion any questions and answers in that Indictment which don't belong there (Emphasis supplied, App. 31-32).

Moments later, after stating he did not object to the admissibility of the transcript of Wright's entire grand jury testimony, Mr. Sargent said, "It is the *portions* of the Indictment that I believe should be withdrawn" (App. 32).

After the Government rested, Mr. Sargent brought the matter up again:

Mr. Sargent: At this point, with your permission, we would like to renew our motion to strike *certain information* from the Indictment (Emphasis supplied, App. 156).

Proceedings resumed in chambers where Judge Briant advised the counsel of his "overall view of the relevance or materiality of a question" (App. 160). He concluded by

stating that "I am prepared to strike out any which are not material within that concept of materiality" (App. 161). At that point, Mr. Sargent specifically objected to the materiality of one set of questions and answers, the materiality of which he does not now contest before this Court (App. 162). Judge Brieant deferred ruling, and the following exchange took place between the Court and Mr. Sargent:

The Court: ...I think the best approach to this matter is for me to state that I understand, Mr. Sargent, that you are moving to strike out all of the questions and answers in Count I, or each of them, one by one, on the theory either that, one, the prosecution has not shown enough evidence so that a reasonable jury acting reasonably could infer willful falsity beyond a reasonable doubt; and the second, that the particular question and answer was not material. Now I would prefer to take the entire transcript and take this question under advisement until we return on Tuesday. Do I state your position adequately?

Mr. Sargent: Yes, you do, Your Honor (App. 163).

After a weekend recess, the discussion resumed and Mr. Sargent said the following:

Mr. Sargent: Your Honor, as we have discussed it in chambers, we have requested that *certain information* in the Indictment be struck and also that a verdict for not guilty be directed at this time (Emphasis supplied, App. 178).

The Court then heard argument on the motion for a judgment of acquittal on Count II, after which the Court announced it would acquit the defendant on that count. Regarding the false declaration count, Judge Brieant said the following:

(The Court:) I don't think there is any problem on Count I. . . . I don't see any particular question that is left

there that would require me to strike out as being a vague question or an immaterial question (App. 182).

* * *

The Court: ...I don't see any underlined answer where the question was vague or where the evidence sought could be said to be immaterial (App. 183).

At this point in the proceedings, Judge Briant asked Mr. Sargent to specify the particular assignments which he believed were not material:

Mr. Sargent: Your Honor, the other question that we raised were that *certain of these questions and answers* are immaterial to the Grand Jury investigation.

The Court: I don't think that is so, but if you want to *pinpoint a particular one* of those that he claims are false, I will deal with that again on the record (Emphasis supplied, App. 184).

Mr. Sargent then specifically requested that certain questions and answers be withdrawn on the grounds that they were not material to the grand jury's investigation. Judge Briant granted some requests but denied others (App. 184-189). The defendant does not challenge on appeal any of these rulings by Judge Briant. After making his rulings, Judge Briant asked, "is there anything further at this time?" (App. 189). Mr. Sargent did not respond and made no additional requests that other assignments be withdrawn from the jury (App. 189).

The motion was not renewed at any later time, although before the case was submitted to the jury Judge Briant provided the defendant with another opportunity to call any specific matters to his attention:

(The Court:) ...Is there anything additional or further? Do any of you have any problems?

Mr. Sargent: Just for the record, we would like to make a motion for a verdict of acquittal at this time (App. 290).

Mascuch and *Goldstein* require a defendant at trial to specify the particular assignment of perjury which is claimed to be immaterial in order to preserve the point for appeal. Recent decisions of this Court have affirmed the validity of these cases and emphasize that a defendant must make "a proper request", *United States v. Natelli*, 527 F.2d 311, 328 (2nd Cir. 1975), in the form of a "specific motion...to withdraw the particular specification from jury consideration". *Id.* at 327. A general motion is not the equivalent of a motion to strike any of the specific assignments of perjury in the count since the defendant must "focus the attention of the trial court on their asserted infirmities". *United States v. Bonacorsa*, 528 F.2d 1218, 1222 (2nd Cir. 1976).

Regardless of the manner in which Judge Brieant may have characterized the defendant's motion (App. 163), it is plain from a reading of the entire record in this case that the defendant only focused the attention of the trial court on a few of the specifications, none of which he has pursued on this appeal. On several occasions, Judge Brieant provided the defendant with an opportunity to challenge the materiality of any specification in the count. However, as Mr. Sargent said below, the defendant objected only to "certain" or "particular" specifications in the count. At no time did he call the court's attention to any infirmities which he now argues exist in other specifications.

Application of the *Mascuch-Goldstein* rule is particularly appropriate in this case where the indictment contains so many assignments of perjury which the defendant concedes are material and which are clearly supported by sufficient evidence.

POINT II

The questions and answers were material to the matter being investigated by the grand jury.

Before sending the indictment to the jury Judge Briant directed that redacted copies be prepared, deleting Count II as well as some answers which the Court ruled were not material. In addition, the Government indicated those portions of the testimony it contended were false by underlining the answers. In redacted form, the indictment alleged forty-two specifications of perjury, all relating to automobile accidents involving Wright. While the defendant acknowledges that the Government may properly include multiple specifications of perjury in one single count, *United States v. Bonacorsa*, 528 F.2d 1218, 1221-1222 (2nd Cir. 1976) he now contends that some of the underlined answers were in response to questions which were not material to the grand jury investigation. Therefore, the defendant maintains that the verdict should be set aside since "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected". *Yates v. United States*, 354 U.S. 298, 312 (1957); and *United States v. Natelli*, 527 F.2d 311, 324-325 (2nd Cir. 1975). Cf. *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955).

In determining materiality, it is appropriate to consider the Supreme Court's observation in *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), quoting *Blair v. United States*, 250 U.S. 273, 282 (1919), regarding the historic function of the grand jury:

Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and

inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

The test of materiality, first expressed by this Court in *Carroll v. United States*, 16 F.2d 951, 953 (2nd Cir. 1927), cert. denied 273 U.S. 763 (1927), is whether the perjurious testimony has "a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation". See also *United States v. Doulin*, 538 F.2d 466, 470 (2nd Cir. 1976). In the context of a grand jury investigation, this Court has held that

materiality of statements . . . may more readily appear than that of similar evidence offered on an issue in civil or criminal litigation, since the purpose of the investigation is to get at facts which will enable the grand jury to determine whether formal charges should be made against someone rather than prove matters directly at issue. *United States v. Stone*, 429 F.2d 138, 140 (2nd Cir. 1970)

However, a "misstatement of fact need not be 'dispositive' of the inquiry in question to be material", *United States v. Gugliaro*, 501 F.2d 68, 71-72 (2nd Cir. 1974), and a conviction under Section 1623 may be sustained where a truthful answer could conceivably have furthered the inquiry by the grand jury. *United States v. Mancuso*, 485 F.2d 275, 281 n.17 (2nd Cir. 1973). Dissenting for unrelated reasons in a recent decision by this Court, Judge Mansfield has noted that the test of materiality is "fixed at such a low level that only a minimal amount of proof need be presented to the court to establish materiality". *United States v. Albergo*, 539 F.2d 860, 865 (2nd Cir. 1976). Materiality is a matter of law to be determined by the court. *United States v. Stone*, *supra*.

Applying these principles to the questions and answers which the defendant now urges are immaterial, it is clear for the reasons set forth below that Judge Briant correctly ruled that they were material as a matter of law.

A. Question regarding the number of accidents in which the defendant was involved.

The defendant argues that the following question and answer were not material:

Q. Have you had more than ten accidents?

A. *I couldn't say.* (App. 18)

If Wright did in fact remember whether he had been involved in more than ten accidents, a true answer would have provided leads which the grand jury could have pursued to determine whether Brinkworth represented the defendant in connection with any other accidents, and to find out whether Brinkworth or others submitted fraudulent statements in support of other automobile accident claims. *United States v. Stone, supra*. The fact that the grand jury had been able to find only one Retainer Statement relating to Wright did not necessarily mean that Brinkworth only represented Wright in connection with one particular accident. It is entirely possible that there were personal injury claims involving Wright which Brinkworth did not report to the Judicial Conference and which the grand jury could have pursued if the defendant's answer had been truthful.

To be material to the grand jury investigation, the questions and answers need not be material to the main issue and do not necessarily have to be directed at the primary subject. They may be material if relevant to any subsidiary issue or line of inquiry. *United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975); and *United States v. Schiavo*, 375 F.Supp. 475, 477

(E.D.Pa., 1974). The question regarding the number of accidents Wright had was material since it pertained to the same general subject matter as the investigation, *United States v. Lazaros*, 480 F.2d 174, 177 n.5 (6th Cir. 1973), and the defendant's answer to this question "frustrated possible inquiry into the involvement" of others in similar wrongdoing. *United States v. Beitling*, 545 F.2d 1106, 1110 (8th Cir. 1976).

In addition to providing the grand jury with information relating to other accidents which might provide leads to other fraudulent claims by Brinkworth or others, this question may be construed as "ancillary to the \$64 question"—did Brinkworth submit fraudulent statements in connection with the January 24, 1972 accident—and "directed toward refreshing the appellant's recollection so that there could be no mistake as to the deliberateness" of his false statements regarding the Brinkworth claim. *Arena v. United States*, 226 F.2d 227, 236 (9th Cir. 1955).

B. Question regarding whether the defendant was injured in the automobile accident.

The defendant also contends that the following question and answer were not material:

Q. Were you injured in this automobile accident?

A. I believe. I remember going to a doctor. Was I injured? I think—I don't remember. (App. 18).

He maintains that Section 1623(d) bars prosecution for this statement since he recanted a moment later and said, "I don't remember having any serious injuries" (App. 19).

Section 1623(d) provides as follows:

Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person

making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission was made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

It is clear from all the evidence in the case that the grand jury was attempting to determine whether Wright's medical bills were accurate as to the injuries suffered by him and the number of visits he made to the doctor. In the face of persistent questioning on these points, he testified on several occasions that he did not remember what his injuries were, what part of his body was injured, what treatment he received, whether he was X-rayed, what doctors treated him, and how many visits he made to the doctors for treatment.

Wright's statement that he didn't have any serious injuries does not amount to a recantation or repudiation of his other statements that he did not know or did not remember whether he was injured in the accident. *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir. 1976). Rather than an admission that such declarations were false, his testimony that "I don't remember having any serious injuries" was simply another effort to frustrate the grand jury's attempt to learn the true extent of any injuries caused by the accident.

In any event, the defendant argues this point for the first time on appeal. He made no motions prior to trial attacking this prosecution on the basis of Section 1623(d), nor did he at any time during or after trial urge the District Court to rule that prosecution was barred by the recantation clause. Any such argument should be raised prior to trial to preserve the point for appeal. *United States v. Kahn*, 472 F.2d 272, 283 n.9 (2nd Cir. 1973); and *United States v. Swainson*, 548 F.2d 657 (6th Cir. 1977).

C. Questions regarding whether the defendant lost any time from work.

The defendant also argues that questions and answers relating to lost wages were not material. The questions and answers are as follows:

Q. Did you lose any time from work on account of this accident?

A. *I don't remember.*

Q. You don't remember?

A. *No, I don't.* I—I'm very vague in that three years ago is a long time. (App. 21)

* * *

Q. You say you didn't lose any money from work?

A. *I don't remember.* (App. 22)

* * *

Q. Did you lose any time from work?

A. *I don't know.* (App. 24)

Contrary to the defendant's assertion that Brinkworth did not submit a claim for lost wages on his behalf, the insurance adjustor testified at trial that Brinkworth sent him a letter on City of Buffalo stationery, indicating that Wright had lost eight days from work, a total of \$218.52 in wages (App. 73, Gov't. Ex. 6). Several months later when the claim was still not settled, the adjustor received a second statement in which the Police Department said that Wright had lost no time from work and "previous letters stating 'lost time' were in error" (App. 80-81).

The materiality of these questions was established by the testimony of Postal Inspector Harm that the grand jury was investigating the lost wage claims which Mr. Brinkworth was submitting to various insurance companies. Indeed, one of

the major reasons for Wright's testimony was to determine whether he actually lost any wages on account of the accident (App. 46-48). Under these circumstances, it is clear that these questions were not only material, but were at the very heart of the matter being investigated by the grand jury.

D. Questions regarding whether the defendant saw the police surgeon or lost any time from work.

The defendant disputes the materiality of the following questions and answers on other grounds:

Q. How many times did you see the police surgeon?

A. *I don't remember . . . I am sure he would have a record of it* (App. 23).

* * *

Q. Did you lose any time from work?

A. *I don't know* (App. 24).

Since Wright told the grand jury that the information sought could be found in the police surgeon's records, he claims that his answers could not have influenced, impeded or hampered the grand jury's investigation.

A similar claim was rejected by this Court in *United States v. Carson*, 464 F.2d 424, 436 (2nd Cir. 1972), where the Court held that "other testimony which the grand jury has heard, except as it may tend to delimit the objective of the inquiry, is therefore irrelevant to a determination of materiality". See also, *United States v. Lee*, 509 F.2d 645, 646 (2nd Cir. 1975); and *United States v. Devitt*, 499 F.2d 135, 139 (7th Cir. 1974). The simple answer to the defendant's objection to asking these questions of him when the information sought was available elsewhere is this Court's comment in *United States v. Sweig*, 441 F.2d 114, 121 (2nd Cir. 1971), that "obviously many investigations would be incomplete and superficial if

the grand jury failed to call those persons who appear to know the most about matters under inquiry."

In view of Postal Inspector Harm's testimony regarding the scope of the grand jury investigation, the materiality of these questions and answers is apparent on their face. The purpose for asking the defendant whether he saw the police surgeon was to learn the true extent of his injuries so that the grand jury could determine whether Dr. Mernan's bill was fraudulent. The accuracy of Dr. Mernan's bill, or the police surgeon's records, regarding treatment Wright received could be proven or disproven by truthful testimony from the defendant, the doctor's patient.

Likewise, where Brinkworth had furnished conflicting lost wage statements regarding the defendant, truthful testimony by the defendant could provide an essential link in establishing whether the original statement was fraudulently prepared and, if so, by whom.

POINT III

The evidence was legally sufficient to support the verdict of guilty.

The defendant professed a lack of memory in response to ninety-five questions put to him in the grand jury. Most of the answers were "I don't know", "I don't remember", or "I don't recall". The Government charged that forty-two of these responses were false material declarations on the grounds that the defendant either actually remembered or could not possibly have forgotten the matters on which he was questioned. *United States v. Camporeale*, 515 F.2d 184, 189 (2nd Cir. 1975); and *United States v. Mathern*, 329 F.Supp 536, 538 (E.D.Pa. 1971).

In addition to materiality, the Government has the burden of proving that the defendant knew his answers were false. *Bronston v. United States*, 409 U.S. 352 (1973). Absent an admission by the defendant, the falsity of the "I don't recall" answer must be established by circumstantial evidence. *United States v. Chapin*, 515 F.2d 1274, 1284 (D.C. Cir. 1975). In deciding this question, "the jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know". *United States v. Sweig*, 441 F.2d 114, 117 (2nd Cir. 1971).

The evidence showed that William Wright was a Buffalo police officer at the time of the accident on January 24, 1972, and when he testified before the grand jury on May 20, 1975. He had been trained to testify in court and other proceedings and had done so many times (App. 218). As a police officer he was required to observe events and communicate effectively regarding those events. Indeed, his character witnesses testified that he communicated very well with others in the course of his duties (Trial Transcript, 282 and 307).

The highly suspicious nature of Wright's accident claim, coupled with his knowledge that the grand jury was investigating the accident, provided a motive for Wright to lie to the grand jury. According to the insurance file, Brinkworth first claimed that Wright lost eight days from work. However, when the insurance company required additional documentation, the original "error" was corrected. The facts surrounding Wright's medical and employment status were further confused by Dr. Mernan's bill which indicated that Wright was treated by the doctor on twenty separate dates between January 26 and March 10, 1972 and was unable to work

for at least one or two weeks (Gov't. Ex. 6). Another unusual circumstance was the fact that hospital records showed that Wright was not X-rayed until February 8, more than two weeks after the accident, even though Dr. Mernan's bill indicates that by the time the X-rays were taken Wright had already been treated by him on eight separate dates (Gov't. Ex. 6).

In short, at the time Wright testified before the grand jury, it appeared that his attorney may have submitted a fraudulent accident claim on his behalf, with or without Wright's knowledge. Furthermore, Wright knew, or had "a vague idea", that he would be asked about the accident by the grand jury and even went so far as to ask advice from Brinkworth, the person whose conduct was being investigated by the grand jury (App. 225-226).

Finding himself in the uncomfortable position of having to explain his association with an apparently fraudulent claim, Wright chose to tell the grand jury that he could not remember any of the details essential to the grand jury's investigation. Under these circumstances, Wright's obvious desire before both the grand jury and the court to disassociate himself from Brinkworth and the accident claim provided sufficient evidence of a motive to lie about the state of his memory.

Two additional points raised for the first time in Appellant's Brief should be addressed, although his failure to object at trial should preclude review on appeal.

First, with the exception of Wright's own allegation, there is no support in the record for the defendant's claim that he was "Intimidated, harassed and badgered" by the prosecutor (Appellant's Brief, 25). It is not improper to tell a grand jury witness that his testimony may not be believed. *United States v. Mandujano*, 425 U.S. 564, 568 (1976); *United States v.*

Cuevas, 510 F.2d 848, 852 (2nd Cir. 1975); and *United States v. Fromin*, 540 F.2d 846, 848 (6th Cir. 1976). Cf. *Beck v. Washington*, 369 U.S. 541, 555 (1962).

Finally, the record also does not support the claim that the same question was repeatedly asked of the defendant. The questions regarding the number of doctor visits were obviously designed to find out the extent of the defendant's lack of memory. In any event, there could be no possible prejudice to the defendant since the several questions formed the basis of a single perjury count. Cf. *Gebhard v. United States*, 422 F.2d 281, 289-290 (9th Cir. 1970).

When viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence was sufficient to support the jury's finding that the defendant knowingly made false material declarations before the grand jury.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: United States of America
vs
William G. Wright

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1075

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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U.S. Attorney Richard J. Arcara, Att: Theodore J. Burns, Asst. U.S. Attorney

U.S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

2nd day of May, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979.